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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re JENNIFER R. et al., Minors.

B178226

LUIS R. and NORMA H.,

(Super. Ct. No. CK47904)
(Hon. Stephen Marpet,
Commissioner)

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALI-
FORNIA FOR THE COUNTY OF LOS
ANGELES,

Respondent;

LOS ANGELES COUNTY DEPARTMENT OF
CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

PETITIONS for Extraordinary Writ. Petitions denied.

Darold M. Shirwo for Luis R., Petitioner.

Murray S. Berns for Norma H., Petitioner.

No appearance on behalf of Respondent.

Raymond G. Fortner, Jr., County Counsel, Kenneth E. Reynolds, Senior Deputy County Counsel, and Larry Cory, Assistant County Counsel for Real Party in Interest.

Law Offices of Lisa E. Mandel, David Estep, and Nancy Aspaturian for Luis R., Minor.

INTRODUCTION

Norma H. and Luis R., mother and father of three-year-old Jennifer R. and two-year-old Luis R., filed petitions for extraordinary writ review from the order of the juvenile court terminating reunification services and setting the selection and implementation hearing. (Cal. Rules of Court, rule 39.1B; Welf. & Inst. Code, § 366.26, subd. (I).)¹ Mother and father do not challenge the termination of reunification services. Rather, they contend the juvenile court abused its discretion in ruling that it was not in the best interest of the children to be placed in the home of their paternal grandparents in Mexico. Father also contends he was denied due process as the result of the asserted incompetence of the children's attorney. We deny the writ.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Jennifer's section 300 petition.*

The juvenile court sustained a petition on behalf of the six-month-old Jennifer stating that she had suffered facial bruising and an earlier fracture of the distal right radius; the injuries were consistent with inflicted trauma and child abuse and could not be sustained except as the result of unreasonable or negligent acts or omissions of either parent; such acts or failure to protect Jennifer endangered her and placed her at serious risk of injury. The petition also stated that father had left the child alone without supervision for at least 45 minutes, although Jennifer required adult supervision. (§ 300, subds. (a), (b), (e).)

¹ All statutory references are to the Welfare and Institutions Code.

The court declared Jennifer a dependent child, removed her from her parents' custody (§ 361), and ordered her suitably placed. The court granted the parents reunification services and visitation.

The Department described the parents as motivated to reunify with Jennifer, as shown by their regular contact with her, and their efforts to attend counseling. It appears that the key concern of the psychological evaluator (Evid. Code, § 730) was the parents' low level of maturity and experience in caring for a baby. The court continued reunification services an additional six months. (§ 366.21, subd. (e).)

In January 2003, the Department filed a petition on behalf of Luis who had been born the previous month. According to the detention report, the parents had not complied with the court-ordered programs in Jennifer's case. They had been evicted from their home, father was unemployed, and the family's whereabouts were unknown because the parents failed to notify the Department of their new address.

Later that month, father telephoned the Department to relay the family's address: a shelter. When the social worker told father Luis would have to be detained, father made clear that he would not voluntarily permit the child to be taken. When the social worker asked the shelter to call the police to assist in the detention, father left, taking the baby with only the clothing the baby was wearing and a blanket. Accompanied by law enforcement, the social worker found father the following day hiding in a friend's house. Luis was detained.

Luis' foster mother reported to the social worker that father mentioned he was planning to take Luis to Tijuana, Mexico. Asked what would happen to Jennifer, father responded he would leave Luis and return for Jennifer.

2. Luis' section 300 petition.

The juvenile court sustained Luis' petition as amended, which stated: Jennifer was a dependent because of severe physical abuse by the parents and neglect by father; Luis' safety was at risk because the parents failed to comply with prior court orders to undergo counseling to address anger management and domestic violence, or to take parenting

classes. (§ 300, subds. (b) & (j).) The court declared Luis a dependent child, removed him from his parents' custody, and ordered him suitably placed. The parents were granted reunification and visitation.

The parents requested that the Department initiate an International Placement in Mexico with the paternal grandparents Maria A. and Juan V. Mother planned to move back to Mexico to be close to the children. The grandmother called the social worker twice requesting the children be placed with her and her husband. The grandmother informed the social worker that she had the means to care for both children. The Department also received a letter from the Mexican social service agency, the DIF (Sistema Estatal para el Desarrollo Integral de la Familia), concerning the request for placement of the children. Accordingly, the Department opined that the paternal grandparents' home would be an appropriate placement for the children. The Department also recommended that a home assessment be initiated. The Department's International Placement Coordinator requested that the appropriate Mexican authorities conduct a home study of the paternal grandparents.

At Jennifer's 12-month review hearing (§ 366.21, subd. (f)), held in June 2003, the court found a substantial probability that Jennifer would be returned to her parents' care by the section 366.22 permanency review hearing, based on their progress and compliance with the case plan. The court continued the matter for a hearing to assess, among other things, the status of the grandparents' home study in Mexico.

By August 2003, visits were unmonitored and appeared to be going well. Although the parents were only in partial compliance with the court's orders and the case plan, the Department opined that there was a possibility Luis could return to his parents by his section 366.21, subdivision (f) hearing. The Department also noted, if the parents failed to reunify with the children, that the grandparents in Mexico were willing to care for Jennifer and Luis. A similar report was provided concerning Jennifer in August 2003.

3. The home study.

The Department had not received any information concerning the status of the home study in Mexico by August 2003.

In September 2003, the court ordered that Jennifer and Luis be placed in the home of their parents under the continuing supervision of the Department. This order was made over the objection of the Department because, although visits had been liberalized to unmonitored weekend-long stays, the parents had yet to complete individual counseling, parenting, domestic abuse, or anger management counseling. Thus, the juvenile court conditioned the home-of-parents order on mother and father continuing to comply with and participate in their counseling programs.

For two months, the children appeared to be doing well in their parents' home. In November 2003, father reported he wanted to move the family to Sacramento for work but could not provide an address for his sister there with whom he planned to live. The court ordered the home-of-parents order to remain in full force and effect. The court noted that the Department could return to court if father provided an address in Sacramento that might require a transfer of the case up north.

Then, at the end of December 2003, the social worker was again unable to locate the family. At the Department's request, the court issued protective custody warrants for Jennifer and Luis and that warrants be issued for mother and father. The warrants were recalled after father telephoned to tell the social worker that the family was living in a motel in Los Angeles County.

4. The subsequent petition.

Jennifer suffered a blow to the back of the head and lost consciousness in January 2004. She sustained multiple bruises to her face, chest, and back, and a hand print on her legs. Jennifer was lethargic, unresponsive, and nauseated. The Department detained the children and filed a subsequent petition (§ 342) on their behalf. The petition alleged the injuries were consistent with inflicted trauma sustained as the result of unreasonable acts by father and negligent acts and omissions by mother. The court ordered the children detained.

Father was arrested and charged with cruelty to a child likely to produce great bodily injury or death.

In June 2004, the Department received an approved home study for the paternal grandparents. The International Placement Coordinator had spoken to the paternal grandmother who stated she was interested in caring for the children. In a letter dated June 2004, translated by the Department, the DIF in Nayarit, Mexico stated, *inter alia*, that it saw no obstacle to the paternal grandparents taking responsibility for the children. Once the children were placed with the grandparents, “courtesy supervision could be provided and parenting classes will be provided.”

After the children’s social worker spoke to the paternal grandparents in Mexico and was assured of their willingness to care for the children, and of the home study’s approval, the Department recommended that the children be placed with the paternal grandparents in Mexico.

The following day, the juvenile court sustained the subsequent petition (§ 342) as amended. (§ 300, subds. (a), (e) & (f).) The court noted its receipt of the documents from the DIF and the Department’s recommendation that the children be sent to Mexico. However, Luis’s attorney observed that the DIF report did not reflect any conversation with the paternal grandparents about the “allegations against the parents, the father’s apparent role in the injuries to Jennifer, the mother’s apparent role in covering up and protecting the father.” Counsel felt there was insufficient information for her to feel Luis would be safe there, “absent a more in-depth investigation by D.I.F. and how these grandparents will protect the children from the mother or the father.” County Counsel agreed that further information was needed. The social worker admitted that she had not considered the concerns raised by Luis’ counsel. Jennifer’s attorney requested that a report be prepared to address what services would be provided by the DIF.

In its supplemental report filed in July 2004, the social worker indicated she had related the abuse allegations to the paternal grandmother and explained the charges against father. The Department’s International Coordinator informed the DIF of the abuse allegations. The social worker had asked the grandparents whether they could protect the children from future harm. They responded that they would ensure nothing happened to the

children. Grandmother stated she would take very good care of the children and not release them to the parents. She stated her willingness to accept the court orders so that she could have the children in her care. Additionally, the DIF indicated that the grandparents were willing to seek judicial or administrative help to provide necessary support. The DIF stated that the grandparents “ ‘will be subjected to supervision by this institution . . . that in the same way will legally intervene in the case when necessary.’ ”

In the same report, the Department explained that it was unable to determine father’s date of release from prison and whether he faced deportation. The Department was not confident that the children would remain safe in the grandparents’ care if father were deported and returned to his home town. Noting father’s previous attempt to flee with Luis, the social worker felt he might try to flee again with the children to Mexico. Thus, the Department indicated it would reconsider releasing the children to the care of the paternal grandparents upon receipt of information about father’s release date and possible deportation.

After father pled no contest to corporal injury on a child (Pen. Code, § 273a), he was sentenced to time served. In August 2004, the Department indicated father could possibly remain in the United States. The Department again recommended that the children be placed in the care of their paternal grandparents in Mexico.

In an updated report from the DIF, requested by the juvenile court, the Mexican authorities indicated the grandparents and children could be provided with monthly visits and the grandparents would be enrolled in parenting classes. The grandmother also assured the investigator that she would keep the children away from father if necessary. Father agreed with the plan to place the children with his parents. He planned to stay in the United States to continue working and to complete his probation term. He could not leave the country without violating his probation and so he did not plan to return to Mexico any time soon. Father was on probation until August 2008. Unable to assure that father would not return to Mexico where he would have easy access to the children, the Department

reconsidered its recommendation and instead proposed the children remain as suitably placed in foster care in Los Angeles County.

In September 2004, a representative from the Mexican Consulate wrote to the juvenile court that the children would receive (1) medical attention, evaluation, and follow-up; (2) a program for domestic violence, registration for parenting classes or referral to the agency for victims of crime; (3) individual therapy by a specialist in emotional trauma; (4) assistance and services provided by the DIF including legal assistance and social work; and (5) the DIF can take action against the parents in the event they try to regain custody.

At the contested disposition hearing on the supplemental petition (§ 342), the social worker explained why she had changed her placement recommendation. She was concerned that the parents would return to that country and would have access to the children, and that the DIF would not provide ongoing supervision. She was concerned that father would be deported to Mexico, although to the best of her knowledge, father had not been deported. She was concerned that the grandparents would allow the parents to take the children. On cross-examination, the social worker acknowledged that the grandmother stated she would contact the DIF for assistance if the parents returned to Mexico, and that she would not release the children to the parents. The DIF stated that services would be provided and the social worker had no reason to believe that was not true. The social worker admitted she had never met the grandparents and had never evaluated their home.

The foster mother for Jennifer and Luis testified about statements mother made during a visit with the children. In this conversation, mother reported that the grandmother declared that the children belonged to mother, and after six months, no one would check on them in Mexico.² Upon learning of this declaration, the social worker had become concerned that the paternal grandparents would release the children to their parents. The social worker called the grandmother, who denied making these representations to mother.

² Objections to this testimony as hearsay were overruled. No objection to the evidentiary ruling was raised.

Jennifer's counsel, joined by mother's and father's attorneys, argued Jennifer should be placed with the grandparents in Mexico. Luis' attorney expressed concern that the grandparents would hand the children over to the parents. She was concerned that Luis would be at risk if placed with the paternal grandparents. She requested the court not place Luis with the grandparents in Mexico, but stated the request was not irrevocable. County Counsel argued that the children should not be placed with the paternal grandparents.

Following argument of counsel, the court denied reunification services under section 361.5, subdivisions (b)(3) and (b)(5), and because the parents had already received more than 18 months of services. Turning to the placement question, the court ruled that it was not in the children's best interest to be sent to the grandparents. In reaching its decision, the court considered the factors in section 361.3 and Family Code section 7950.

Acknowledging that the grandparents' home was appropriate and that they could provide proper and effective control of the children, the court listed the factors militating against placement in Mexico. The grandparents have no relationship with the children. (§ 361.3, subd. (a)(6).) A Mexican placement would interfere with relative visitation for those relatives living in Northern California. (§ 361.3, subd. (a)(7)(F).) Additionally, the two factors the juvenile court considered dispositive were the grandparents' ability to provide the children with legal permanence and ability to protect the children from their parents. (§ 361.3, subd. (a)(7)(H) & (D).) As for permanence for the children, the court explained, given reunification had failed, the issue of greatest concern was the possibility of adoption for the children. With respect to the ability to protect the children from their parents, observing that the grandparents stated they would do so, the juvenile court could not ignore father's repeated history of absconding with the children. The court stated, "This concerns me greatly because this is the kind of conduct that I fear could result in happening in Mexico without protections in place here in California. . . ." Weighing the statutory factors, the court stated it had, "to balance, and based upon all of the evidence before me, based on everything I've heard, the concerns of the court are such that I am not going to place the

priority of the grandparents as a preference in light of all the evidence and the history of this case.”

The court ordered the children removed from their parents’ custody (§ 361) and placed in a potential adoptive home. The parents each filed their notice of intent to file writ petitions.

CONTENTIONS

Mother and father’s sole contention is that the court erred in failing to place the children with the paternal grandparents in Mexico. Father contends he was denied due process.

DISCUSSION

1. *Placement with family in Mexico.*

We review the juvenile court’s custody placement order for abuse of discretion. (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 863.) “ ‘The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.’ [Citations.]” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) That is, “ ‘[t]he reviewing court should interfere only “ ‘if we find that under all the evidence, viewed most favorably in support of the trial court’s action, no judge could reasonably have made the order that he did.’ [Citations.]” [Citation.]’ [Citation.]” (*Alicia B. v. Superior Court, supra*, at p. 863.)

Father asserts that the juvenile court must base its placement decision on clear and convincing evidence. That standard is appropriate when the court is determining whether to remove the child from the parents’ custody. (§ 361.) However, the question here was placement, not removal. When a child is removed from his or her parents’ custody under section 361, the juvenile court places the care, custody, control, and conduct of the child under the social worker’s supervision. (§ 361.2, subd. (e).) The social worker may place the child in several locations, including the approved home of a relative. (§ 361.2, subd. (e)(1)-(8).) Relatives who request placement of a dependent child are given preferential

consideration. (§ 361.3, subd. (a).) (*Alicia B. v. Superior Court, supra*, 116 Cal.App.4th at p. 863.)

“However, preferential consideration under section 361.3 ‘Does not create an evidentiary presumption in favor of a relative[; it] merely places the relative at the head of the line when the court is determining which placement is in the child’s best interests.’ [Citation.]” (*Alicia B. v Superior Court, supra*, 116 Cal.App.4th at p. 863.) In determining whether to place the child with the requesting relative, the court and social worker consider the factors enumerated in section 361.3, subdivision (a).³ (*Id.* at pp. 862-863.)

³ Section 361.3, subdivision (a) states: “In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative. In determining whether placement with a relative is appropriate, the county social worker and court shall consider, but shall not be limited to, consideration of all the following factors:

“(1) The best interest of the child, including special physical, psychological, educational, medical, or emotional needs.

“(2) The wishes of the parent, the relative, and child, if appropriate.

“(3) The provisions of Part 6 (commencing with Section 7950) of Division 12 of the Family Code regarding relative placement.

“(4) Placement of siblings and half-siblings in the same home, if that placement is found to be in the best interest of each of the children as provided in Section 16002.

“(5) The good moral character of the relative and any other adult living in the home, including whether any individual residing in the home has a prior history of violent criminal acts or has been responsible for acts of child abuse or neglect.

“(6) The nature and duration of the relationship between the child and the relative, and the relative’s desire to care for, and to provide legal permanency for, the child if reunification is unsuccessful.

“(7) The ability of the relative to do the following:

“(A) Provide a safe, secure, and stable environment for the child.

“(B) Exercise proper and effective care and control of the child.

Among the factors to be considered are the ability of the relative to (1) “[p]rovide legal permanence for the child[ren] if reunification fails” (§ 361.3, subd. (a)(7)(H)); (2) “[f]acilitate visitation with the child’s other relatives” (§ 361.3, subd. (a)(7)(F)); and (3) “[p]rotect the child[ren] from his or her parents.” (§ 361.3, subd. (a)(7)(D).) Yet, “[t]he linchpin of a section 361.3 analysis is whether placement with a relative is in the best interests of the minor. [Citation.]” (*Alicia B. v. Superior Court, supra*, 116 Cal.App.4th at pp. 862-863.)

In this case, the juvenile court carefully weighed all of the factors along with the evidence. The court stated it had spent some time considering the issue. It heard argument, received reports and heard testimony, reviewed a number of letters from the Department, the DIF, and the Mexican Consulate. The court recognized that the home study in Mexico was approved (§ 361.3, subd. (a)(7)(A) & (C)), and that the grandparents appeared to be able to exercise proper and effective care and control of the children. (§ 361.3, subd. (a)(7)(B).)

Weighed against these factors, was the court’s finding the grandparents could not facilitate visitation with the Northern California relatives. (§ 361.3, subd. (a)(7)(F)).

Additionally, and more important, the court found that the grandparents would not be able to “[p]rotect the child[ren] from his or her parents.” (§ 361.3, subd. (a)(7)(D).)

“(C) Provide a home and the necessities of life for the child.

“(D) Protect the child from his or her parents.

“(E) Facilitate court-ordered reunification efforts with the parents.

“(F) Facilitate visitation with the child’s other relative.

“(G) Facilitate implementation of all elements of the case plan.

“(H) Provide legal permanence for the child if reunification fails.

“However, any finding made with respect to the factor considered pursuant to this subparagraph and pursuant to subparagraph (G) shall not be the sole basis for precluding preferential placement with a relative.”

Although, the juvenile court received evidence that the paternal grandparents declared they would protect the children, it properly weighed against this, the safety of the children. These children became dependents of the court because Jennifer was at least twice severely physically abused while in the care of her parents. The court also had ample evidence of the parents' willingness to abscond with the children and flout the Department's very attempts to protect the children. This evidence is not speculative, father's contention to the contrary notwithstanding. Father disappeared with Luis when the social worker tried to detain the newborn; the court issued protective custody warrants when the parents lost their housing and made themselves unavailable to the Department. Father had planned to take newborn Luis to Tijuana, Mexico, where he would leave the child while he returned to take Jennifer. Mother had stated her plans to return to Mexico to be near the children.⁴ And, the court heard the testimony of Luis' foster mother that the grandmother had declared that the children belonged to mother and no one would pay attention to the family after the children had been in Mexico for six months. The court was entitled to give this testimony credence. This evidence supports the court's conclusion that the children would not be protected from their parents while in the custody of the grandparents. Given that the primary purpose underlying dependency proceedings is the protection of the child (*In re Kerry O.* (1989) 210 Cal.App.3d 326, 333), and given that these children are doing well in their foster placement, the court did not abuse its discretion in declining to move the children from their foster home to that of their grandparents.

The juvenile court's placement decisions are reviewed for abuse of discretion. We will not disturb that decision, “ “ “unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination

⁴ Father insists that the possibility that a parent might abduct his child exists for any placement. However, in this case, father has a history of absconding with his children to avoid interference by the authorities, which history places the likelihood of another abduction that much more likely.

[citations].” ’ [Citations.]” (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318.) The court’s decision here was not based on speculation, nor was it arbitrary or capricious.

2. *Father was not denied due process by the conduct of Luis’ attorney.*

Father contends he was denied due process by the “incompetence and slackjawed conduct of the minor Luis’ attorney. . . .” Under section 317, subdivision (e), the child’s attorney is charged “with the representation of the child’s interests.” Counsel is charged with making necessary investigations or cross-examining witnesses, to ascertain the facts relative to the child’s interest. (*Ibid.*) Here, Luis’ attorney triggered a deeper investigation into the propriety of sending the children to their paternal grandparents than had yet been done.

Luis’ attorney’s obligation was to represent Luis’ interests; *not those of father*. The reason separate counsel is appointed for a child is exactly because the child’s interest may conflict with those of the parents. Hence, there will be occasions where in representing the child, the child’s counsel will advocate for a position that conflicts with the parents’ interests. Luis’ attorney’s obligation was to represent Luis, not to “adequately advocate facts/evidence” for a position that father approves of.

DISPOSITION

The petitions are denied.

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ALDRICH, J.

We concur:

CROSKEY, ACTING P. J.

KITCHING, J.